

O-203-03

TRADE MARKS ACT 1994
IN THE MATTER OF APPLICATION No 2272419
BY PYRONIX LIMITED
TO REGISTER A TRADE MARK
VERITEC
IN CLASS 9

AND IN THE MATTER OF OPPOSITION THERETO
UNDER NUMBER 80289
BY TEXECOM LIMITED

BACKGROUND

1) On 13 June 2001, Pyronix Limited of Pyronix House, Braithwell Way, Hellaby, Rotherham, South Yorkshire, S66 8QY applied for the trade mark VERITEC in respect of the following goods in Class 9:

“Electronic apparatus and instruments relating to intrusion detection technology; intrusion detection apparatus; control panels for intrusion detection apparatus; electronic apparatus and instruments for detecting body heat, movement and/or light; infra-red light detection apparatus and instruments; infra-red receiver motion detection devices; intruder alarms and detection devices.”

2) On 24 October 2001, Texecom Limited of Texecom House, 559 Wilbraham Road, Manchester, M21 0AE filed notice of opposition. The grounds of opposition are in summary:

a) The opponent is the registered proprietor of UK Trade Mark No 1573433 VERITAS registered as of 27 May 1994 for “Control equipment for alarms included in Class 9”.

b) The mark in suit is both visually and phonetically similar to the opponent’s mark which has been used since at least 1994 upon alarm controls and enjoys an extensive reputation in the UK. The mark in suit therefore offends against Sections 5(2)(b) and 5(4)(a) of the Trade Marks Act 1994.

3) On 4 March 2002, the applicant filed a counterstatement accepting that the opponent was the registered proprietor of the mark 1573433 but denied all the other grounds.

4) Both sides filed evidence in these proceedings and both asked for an award of costs in their favour.

5) The matter came to be heard on 20 May 2003. The applicant was represented by Mr Fiddes of Messrs Urquhart-Dykes & Lord. The opponent was represented by Mr Hill of Messrs Wilson Gunn M’Caw.

OPPONENT'S EVIDENCE

6) The opponent submitted a statement, dated 19 June 2002, by Robert Austen the Managing Director of Texecom Limited a position he has held since 1993. He states that his company has used the mark VERITAS continuously since 1994 "on or in connection with goods comprising alarm apparatus". At exhibit RA1 he provides a collection of advertising leaflets, instruction booklets and samples of packaging showing various goods sold by his company. He states that all of this material was in print prior to the relevant date, 13 June 2001. Although most of these items are not dated, there are a number of boxes which show use of the opponent's mark which have dates prior to the relevant date or can be dated due to use of a "millennium bug safe" mark.

7) Mr Austen states that "In relation to the advertising leaflets, my company typically publishes and distributes approximately 20 to 30,000 of these in a single print run of each of 23 different leaflets relating to products sold under the VERITAS trade mark. In each year there will be at least one print run and commonly a number of print runs."

8) Mr Austen provides turnover figures for goods sold under the VERITAS trade mark as follows:

Year ending	£	Units sold
1995 estimated	1,007,000	33,600
1996 estimated	1,979,000	65,900
1997 estimated	3,073,000	102,400
1998	2,317,000	87,000
1999	2,361,000	88,500
2000	2,292,000	86,500
2001	2,643,000	100,100

9) Mr Austen states that the trade mark has been used throughout the UK and at exhibit RA2 he provides a selection of invoices showing customers addresses across the UK. He states that the invoices show use of the trade mark VERITAS. Although a few of the invoices are after the relevant date the majority are dated prior to 13 June 2001. The addresses are from across the UK. A number of invoices do not show the word VERITAS instead showing a code which appears to be the same as that which appears alongside the word VERITAS on a number of other invoices.

10) At exhibit RA3 Mr Austen provides copies of publications in which advertisements have appeared. At exhibit RA4 Mr Austen provides a copy invoice relating to an advertisement in a trade publication. In addition to these advertisements he states that his company has attended trade exhibitions including what he describes as "the most important UK trade show for the security industry" IFSEC where goods under the opponent's mark have been shown.

11) Mr Austen states that his company has used the mark VERITAS in “a small number of different forms”. However, he contends that in all cases the dominant feature has been the word VERITAS. He states that as a result of such activity the trade mark VERITAS has acquired a reputation in the UK.

APPLICANT’S EVIDENCE

12) The applicant filed two declarations. The first, dated 19 September 2002, is by Craig Leivers the Research and Development Director of the applicant company, a position he has held since January 1999. He states that prior to joining the applicant company in 1996 he held the position of Divisional Director for Verified Systems Ltd. He states that Verified Systems Ltd was registered in 1993 by himself and a colleague. The company did not trade until September 1994 by which time it had become a division of Intercom Communications Ltd. He states that during the period 1994-1996 Verified Systems became “the market leader in the provision of audio verification systems, becoming the preferred supplier to Modern Alarms, now known as ADT, Securicor and Secom Ltd”.

13) Mr Leivers states that Verified Systems quickly built up a significant name and reputation within the system being approved by all the major Alarm Receiving Centres. He states that substantial sales were made but the records are not available due to Intercom Communications entering into receivership and twice being sold. He states that in 1994 the applicant company approached Verified Systems with a view to manufacturing a range of detectors which were sold under the VERIFIED SYSTEMS brand. In July 1996 the applicant company acquired the business of Verified Systems. At the same time he states that Verified Systems changed its name to Confirmed Security Systems Ltd and Pyronix company Broomco 1098 Ltd changed its name to Verified Systems Ltd. He states that since this date the applicant has marketed a range of products under the “Verified Systems” name. He lists these as being “Acoustic Controller, Acoustic Expander, Acoustic Sensor, Orbiter, Octopus, VX, Equinox VX and Enforcer VX”.

14) At exhibit CL1 Mr Leivers provides copies of Verified Systems products prior to the acquisition by Pyronix in 1996. At exhibit CL2 he provides examples of material used by the applicant company following acquisition. He states that both exhibits show the Verified Systems branding being dominant. The exhibits show that the name “Verified Systems” was used, however in all the brochures the letter “v” is part of an elongated tick device.

15) Mr Leivers provides sales figures for Verified Systems and also Pyronix Verified Systems Detectors (PVSD) as follows:

Year	Verified Systems £	PVSD £
1995	76,866	-
1996	90,653	-
1997	n/a	-

1998	21,251	4,114
1999	14,543	1,280
2000	288	-
2001	90	469

16) Mr Leivers states that:

“To run alongside the “Verified Systems” brand, VERITEC, using two detection technologies, was chosen as the product name for another confirmation product, this addressing sequential confirmation markets. The initial alarm is confirmed by a second alarm from another area of the building or alternative protective technology. VERITEC was chosen as Verified Systems had built up a good reputation within the confirmation of alarms market sector, and it was widely known that Verified Systems was a trading name of Pyronix, as well as being derived from a combination of “verification” and “technology”. We feel that we are justified in the use and registration of the VERITEC name and would suggest that VERITEC does not carry the same pronunciation as VERITAS. The reference to “verified” and “verification” in relation to the particular technology used for VERITEC is particularly important, and the association is emphasised by the use with the long standing brand Verified Systems”

17) Mr Leivers states that his company has received acclaim for its products under the mark in suit and states that such recognition within the security industry should be seen as indicating that the industry is not confused between the marks of the two parties. Exhibit CL3 shows that in 2002 the applicant won an award for its Veritec P2 detector. He also provides examples of advertising and packaging at exhibit CL4 which shows use of the Pyronix name as well as the mark in suit, these are undated. Lastly at exhibit CL5 he provides a selection of articles and advertisements all of which are after the relevant date.

18) The applicant also filed a declaration, dated 19 September 2002, by Alan Michael Fiddes their Trade Mark Attorney. Mr Fiddes states that he has carried out research on the internet which shows that the terms “verification” and “verify” are commonplace within the alarm industry. At exhibit AMF1 he provides copies from the internet showing references by many alarm companies to “alarm verification” and also articles on concerns over verification of alarms and false alarms. The applicant is listed in the UK Internet Security Directory as one of the companies specialising in alarm verification. All of the pages in the exhibit are dated after the relevant date, although these were provided to show that the term “verification” was still in general use by the industry.

19) At exhibit AMF2 Mr Fiddes provides examples of two websites which show use of brands bearing the “VERI” prefix in relation to security products. This he claims shows that in the alarm industry this prefix and the words “verify” and “verification” are generic and little emphasis will be placed on the “veri” prefix. The exhibits show use of the term “veri-safe” for cash handling and by an American company VeriSign which has a product called Web

Business. The article referring to this last company was titled “Veri Helpful Design”

20) At exhibit AMF3 Mr Fiddes provides a list of marks registered for Class 9 goods from the UK and Community Trade Mark Registers which have the prefix “VERI”. However, I do not find “state of the Register” evidence to be of assistance. At exhibit AMF4 he provides a copy of the examination report of the UK Trade Marks Registry where no objection was raised in relation to the opponent’s mark. Lastly he states that the word “veritas” is a Latin word which means “truth” and “reality”. At exhibit AMF5 he provides a printout from an online dictionary evidencing this. He claims that this specific meaning distinguishes the opponent’s mark from that of his client.

OPPONENT’S EVIDENCE IN REPLY

21) The opponent filed two statements. The first, dated 14 February 2003, is by Richard Hill the opponent’s Trade Mark Attorney. He states that the applicant’s evidence does not show that the prefix “veri” is generic in the security industry and states that there is no abbreviation for the words “verify” or “verification” in the Oxford English dictionary. He also comments on other aspects of the applicant’s evidence, however I do not find his views of assistance.

22) The second statement, dated 12 February 2003, is by Mark Pitts the Chief Design Engineer of the opponent company, a position he has held since 1999. He points out that the internet pages at exhibit AMF1 of the applicant’s evidence are not dated and states:

“However the pages of the exhibit do suggest that alarm verification was a term used in relation to a certain type of alarm system in which a normal IR sensor was combined with an audio and/or video receiver. In fact I am aware of systems of this kind being available within the security market a few years ago but this terminology has now been superseded and the technology is falling out of common use and is being superseded by sequential confirmation technology.”

23) Mr Pitts states that in May 2001 a draft new British Standard was circulated. The terminology used in the standard was “Confirmed Alarm” and he claims that the industry has now adopted this terminology. At exhibit MP2 he provides copies of the applicant’s literature and website which shows this term being used. At exhibit MP3 he provides minutes from a BSIA Technical committee, dated May 2001, where the new wording was approved and which was attended by Mr Leivers. He also makes a number of comments regarding the applicant’s evidence which I do not find of assistance.

24) This concludes my review of the evidence.

DECISION

25) As a preliminary point the applicant asked for paragraph six of the statement of Mr Hill to be deemed inadmissible as “the statements contained in this paragraph are clearly opinion

evidence”. I declined to rule the paragraph inadmissible, however I did indicate that I would attach little weight to the views expressed by Mr Hill in this paragraph.

26) At the hearing the opponent withdrew the ground of opposition under Section 5(4).

27) The only ground of opposition is under Section 5(2)(b) of the Act which states:

“5.-(1)...

(2) A trade mark shall not be registered if because -

(a)....

(b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected,

there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark.”

28) An earlier right is defined in Section 6, the relevant parts of which state:

“6.-(1) In this Act an "earlier trade mark" means -

(a) a registered trade mark, international trade mark (UK) or Community trade mark which has a date of application for registration earlier than that of the trade mark in question, taking account (where appropriate) of the priorities claimed in respect of the trade marks,”

Inherent distinctiveness

29) I must consider whether the opponent’s earlier mark is inherently distinctive. The mark consists of the word “VERITAS”. It was common ground that this is a Latin word meaning “truth”. The applicant contended that the prefix “veri” is descriptive of products “which verify” and are in common use by the alarm industry. The applicant’s evidence regarding use of the terms “verification” and “verify” is from the internet and the only date is that of the search which is after the relevant date. However, I believe it is reasonable to infer from this evidence that at the relevant date the terms “verification” and “verify” were in common use in the industry.

30) The applicant also contends that the prefix “veri” would be seen as an abbreviation of, or suggestive of, the words “verification” or “verify”. However, I do not find that the applicant has shown that this is the case. The items in exhibit AMF2 appear to show the term “veri” being used as a misspelling of the word “very”. The other exhibit AMF3 is merely a search of the UK and Community Trade Marks registers, which does not, in my opinion, assist the applicant. (See *Torremer* case [BL 0/207/02] unreported).

Enhanced distinctiveness through use

31) I have to consider the issues before me as of the relevant date, which is the date of the filing for registration, 13 June 2001. The opponent has to demonstrate that it had a valid case at this date.

32) The opponent claims that it has a significant reputation in the UK as a result of its use of the mark “veritas” since 1994. However, the turnover figures provided were not put into context, (either in percentage terms or in market share) nor was any independent evidence provided.

Effect of evidence under Section 5(2)(b)

33) As per *Sabel BV v. Puma AG* [1998] RPC 199 and *Canon Kabushiki Kaisha v. Metro-Goldwyn-Meyer Inc.* [1999] RPC 117 the reputation of a trade mark has to be taken into account in the global appreciation of likelihood of confusion. In *Sabel* the European Court of Justice (ECJ) held that:

“In that perspective, the more distinctive the earlier mark, the greater will be the likelihood of confusion. It is therefore not impossible that the conceptual similarity resulting from the fact the two marks use images with analogous semantic content may give rise to a likelihood of confusion where the earlier mark has a particularly distinctive character, either *per se* or because of the reputation it enjoys with the public.”

34) In *Canon* the ECJ held that:

“The distinctive character of the earlier trade mark, and in particular its reputation, must be taken into account when determining whether the similarity between the goods or services covered by the two trade marks is sufficient to give rise to the likelihood of confusion.”

35) Consequently, the reputation of a trade mark can assist where it is not particularly inherently distinctive or where there is a low degree of similarity between the respective goods or services.

36) From the evidence before me I do not consider that the opponent can claim an enhanced distinctive character based on use. However, the opponent’s mark has a high degree of inherent distinctiveness.

Section 5(2)(b) - Likelihood of confusion

37) In determining the question under section 5(2), I take into account the guidance provided by the European Court of Justice (ECJ) in *Sabel Bv v Puma AG* [1998 RPC 199], *Canon Kabushiki Kaisha v Metro-Goldwyn-Meyer Inc.* [1999] E.T.M.R. 1, *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel B.V.* [2000] F.S.R. 77 and *Marca Mode CV v Adidas AG* [2000] E.T.M.R 723.

Comparison of goods and services

38) The applicant accepted that the specifications of the two marks were similar. To my mind they are very similar.

Comparison of signs

39) When comparing the signs of the two parties I take into account the following:

(a) the matter must be judged through the eyes of the average consumer, of the goods / services in question; *Sabel Bv v Puma AG* page 224, who is deemed to be reasonably well informed and reasonably circumspect and observant - but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind; *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel B.V.* page 84, paragraph 27;

(b) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details; *Sabel Bv v Puma AG* page 224;

(c) the visual, aural and conceptual similarities of the marks must therefore be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components; *Sabel Bv v Puma AG* page 224.

40) The relevant public is the customer for security apparatus for the protection of property. The mark in suit is “VERITEC” whilst the opponent’s mark is “VERITAS”. The marks clearly have visual and aural similarities in that they are the same length and they share the first five letters. The only differences are in the last two letters of each mark. The applicant contends that the average consumer would recognise the “foreign” nature of the opponent’s mark with an impact on its pronunciation, I do not accept this contention. Only a small proportion of the UK public speak and understand Latin. Further, those that understand Latin tend to be more numerous in certain professions, such as medicine and the law. Consequently, it is doubtful whether the average consumer of security apparatus of the type in question would understand the Latin meaning of VERITAS.

41) The applicant contended that the marks have co-existed in the marketplace yet the opponent was unable to provide evidence of actual confusion. However, I note that the mark used until 1996 differed from that applied for in the instant case as the letter “v” formed part of an elongated tick device. The mark in suit has appeared at exhibitions, trade fairs and been the subject of advertisements in trade journals, but the lack of actual instances of confusion has to be considered against a very low level of sales and also the use of the mark in suit alongside the “house” mark of “pyronix”.

41) In my opinion the similarities of the marks far outweigh their differences.

Conclusion

42) The likelihood of confusion must be appreciated globally, taking account of all relevant

factors; *Sabel Bv v Puma AG* page 224. The specifications are very similar, and the visual and aural similarities of the marks outweigh the differences. There was a likelihood of confusion at 13 June 2001, consequently, the opposition under Section 5(2) succeeds.

43) The opposition having succeeded the opponent is entitled to a contribution towards costs. I order the applicant to pay the opponent the sum of £2,200. This sum to be paid within seven days of the expiry of the appeal period or within seven days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 15TH day of July 2003

George W Salthouse
For the Registrar
The Comptroller General